A

Re Yap Ying Long; ex p FCJ Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D2–29-947 OF 1998
ABDUL AZIZ J
20 DECEMBER 1999

B

Bankruptcy *— Petition — Reinstatement of bankruptcy petition — Parties agree to reinstatement — Whether fresh petition had to be presented with leave of court — Bankruptcy Rules 1969 rr 120 & 276 — Rules of the High Court 1980 O 32 r 5(4)*

C

The creditor's petition was struck out by the senior assistant registrar ('SAR') because the judgment creditor and the judgment debtor were absent on the hearing date. At that time, the petition had not been served on the judgment debtor. The judgment creditor applied for the petition to be reinstated where, on the hearing date, counsel for the judgment creditor appeared for the judgment debtor's solicitors and informed the court that they did not object to the application. The petition was reinstated and then the judgment debtor applied to strike out the reinstated creditor's petition. The SAR dismissed the judgment debtor's application and they appealed to the judge contending that as the creditor's petition had been struck out for non-appearance, pursuant to r 120 of the Bankruptcy Rules 1969 ('the Rules'), the judgment creditor could only proceed against the judgment debtor by presenting a fresh petition with the leave of the court. They also contended that the SAR had no jurisdiction to allow the reinstatement of the petition. The judgment debtor's submission was prompted by *Mariam bte Sasiman v BBMB Factoring Bhd* which had not been published at the time when the judgment debtor's solicitors consented to the reinstatement of the creditor's petition. They, however, claimed that the consent was immaterial because the consent could not confer jurisdiction where there was none.

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Held, dismissing the appeal with costs:

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(1) The purpose of r 120 was to bar the presentation of the subsequent petition without the leave of the court. Rule 120 however did not state the consequence of the non-appearance, neither did it say that presenting another petition was the only course open to the creditor. Therefore, it ought not to be inferred that it intends to say so (see p 149C). As there was an absence of a rule on the question of the reinstatement of a bankruptcy petition, r 276 of the Rules applied to render applicable O 32 r 5(4) of the Rules of the High Court 1980 which provided for its reinstatement. The application for reinstatement in this case was therefore in order and the judgment debtor not objecting, the reinstatement was not capable of being questioned (see p 149F–H); *Mariam bte Sasiman v BBMB Factoring Berhad* [1999] 2 AMR 1664 not followed.

H

I

(2) Alternatively, the question of reinstatement being a question of mere procedure as to which there was a lacuna in the Rules, the parties were at liberty to agree to the procedure of reinstatement. The judgment debtor in this case, by not objecting to the application for reinstatement, had agreed to the procedure of reinstatement and to the reinstatement itself which did not violate the principle behind r 120 and neither had it caused injustice to the judgment debtor although the decision in *Mariam bte Sasiman* was not known to the judgment debtor's solicitors when the reinstatement was consented to. It must therefore be assumed that the solicitors for the judgment debtor, after taking into account the judgment creditor's explanation and the terms of r 120, felt that the reinstatement was fair and just. The judgment debtor cannot then say that the petition ought to have been and to be struck out because, on jurisdictional grounds, it ought not to have been reinstated in the first place (see pp 149H–150D).

[Bahasa Malaysia summary

Petisyen pemiutang telah dibatalkan oleh penolong kanan pendaftar ('PKP') kerana pemiutang penghakiman dan pemiutang penghakiman tidak hadir pada tarikh perbicaraan. Pada masa tersebut, petisyen tersebut belum lagi diserahkan kepada penghutang penghakiman. Pemiutang penghakiman memohon agar petisyen dihidupkan semula di mana, pada tarikh perbicaraan, peguam untuk pemiutang penghakiman hadir bagi pihak peguam penghutang penghakiman dan memberitahu mahkamah bahawa mereka tidak membantah permohonan tersebut. Petisyen tersebut dihidupkan semula dan penghutang penghakiman memohon untuk membatalkan petisyen pemiutang yang dihidupkan semula. PKP telah menolak permohonan penghutang penghakiman dan mereka merayu kepada hakim dan menegaskan bahawa oleh kerana pretisyen pemiutang telah pun dibatalkan untuk ketidakhadiran, menurut k 120 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-kaedah tersebut'), pemiutang penghakiman hanya boleh bertindak terhadap penghutang penghakiman dengan mengemukakan petisyen baru dengan kebenaran mahkamah. Mereka juga menegaskan bahawa PKP tidak mempunyai bidang kuasa untuk membenarkan pengembalikan semula petisyen tersebut. Hujahan penghutang penghakiman telah disokongkan oleh kes *Mariam bte Sasiman v BBMB Factoring Bhd* yang belum diterbitkan pada masa peguam penghutang penghakiman membenarkan petisyen pemiutang dihidupkan semula. Namun, mereka mendakwa bahawa kebenaran tersebut adalah tidak material kerana kebenaran tersebut tidak boleh memberikan bidang kuasa di mana ia tiada.

Diputuskan, menolak rayuan dengan kos:

(1) Tujuan k 120 adalah untuk menghalang pengemukaan petisyen terkemudian tanpa kebenaran mahkamah. Namun, k 120 tidak

menyatakan akibat ketidakhadiran dan ia juga tidak mengatakan bahawa pengemukaan petsieyen yang satu lagi hanyalah satu-satunya jalan yang terbuka kepada pemiutang. Oleh itu, ia tidak patut disiratkan bahawa ia berniat berkata sedemikian (lihat ms 149C). Oleh kerana tidak terdapat kaedah berkenaan dengan persoalan menghidupkan semula petisyen kebankrapan, k 276 Kaedah-Kaedah tersebut adalah terpakai untuk pemakaian A 32 k 5(4) Kaedah-kaedah Mahkamah Tinggi 1980 yang memperuntukkan ia dihidupkan semula. Oleh itu, permohonan untuk menghidupkan semula di dalam kes ini adalah teratur dan penghutang penghakiman tidak membantah, penghidupan semula tersebut tidak boleh dipersoalkan (lihat ms 149F–H); *Mariam bte Sasiman v BBMB Factoring Bhd* [1999] 2 AMR 1664 tidak diikut.

(2) Sebagai alternatif, persoalan menghidupkan semula yang hanya semata-mata merupakan persoalan prosedur di mana terdapat kekosongan di dalam Kaedah-Kaedah, pihak-pihak adalah bebas untuk bersetuju kepada prosedur menghidupkan semula. Penghutang penghakiman di dalam kes ini, dengan tidak membantah permohonan untuk menghidupkan semula, telah bersetuju kepada prosedur menghidupkan semula dan penghidupan semula itu sendiri tidak melanggar prinsip di sebalik k 120 dan juga tidak menyebabkan ketidakadilan kepada penghutang penghakiman walaupun keputusan dalam *Mariam bte Sasiman* tidak diketahui oleh peguam penghutang penghakiman apabila penghidupan semula dipersetujui. Oleh itu, ia mestilah boleh diandaikan bahawa peguam-peguam untuk penghutang penghakiman, selepas mengambil kira penjelasan pemiutang penghakiman dan peruntukan k 120, berpendapat bahawa menghidupkan semula adalah adil dan saksama. Pemiutang penghakiman tidak boleh katakan bahawa petisyen patut dibatalkan kerana alasan bidang kuasa, ia tidak patut dihidupkan semula di peringkat awal (lihat ms 149H–150D).]

Notes

For cases on setting aside bankruptcy petitions, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1867–1869.

Cases referred to

Mariam bte Sasiman v BBMB Factoring Bhd [1999] 2 AMR 1664 (not folld)

Legislation referred to

Bankruptcy Rules 1969 rr 120, 276
Rules of the High Court 1980 O 32 r 5(4)

N Sivananthan (*Messrs Sivananthan*) for the judgment debtor. A

Daniel Siew (*AG Tan* with him)(*Messrs Shui-Tai*) for the judgment creditor.

Abdul Aziz J: The creditor's petition in this case was issued on 11 September 1998. It gave 12 November 1998 as the date of hearing. On that date the judgment creditor was absent. The judgment debtor had not B been served with the petition and was also absent. Because the judgment creditor was absent, the senior assistant registrar struck out the creditor's petition.

On 6 April 1999, on the application of the judgment creditor — the judgment debtor, who was represented by solicitors, not objecting — the C creditor's petition was reinstated. What actually happened on that day was that counsel for the judgment creditor appeared also on behalf of the judgment debtor's solicitors and said that the judgment debtor's solicitors did not object to the application.

On 10 June 1999, the judgment debtor applied for the striking out of D the reinstated creditor's petition. That application was heard together with the creditor's petition. The senior assistant registrar dismissed the judgment debtor's striking-out application and allowed the creditor's petition. The judgment debtor now appeals.

The question in this appeal is whether the creditor's petition should E have been struck out.

The ground for striking out that has been relied on by the judgment debtor is one that depends on r 120 of the Bankruptcy Rules 1969 ('the Rules'). As far as material, that rule says:

> If any creditor neglects to appear on his petition no subsequent petition F against the same debtor ... shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court.

Based on that rule, learned counsel for the judgment debtor submitted that after the creditor's petition had been struck out on 12 November 1998 for the non-appearance of the judgment creditor, the only step that the G judgment creditor could take to proceed further against the judgment debtor was to present a fresh petition with the leave of the court. Learned counsel for the judgment debtor also submitted that the procedure for reinstatement was not available in bankruptcy proceedings. The entire submission was prompted by the judgment of Faiza Tamby Chik J in *Mariam bte Sasiman v BBMB Factoring Bhd* [1999] 2 AMR 1664, which H was delivered on 5 October 1998 but had not yet been published, and therefore was not within the knowledge of the judgment debtor's solicitors, when the judgment debtor's solicitors consented to the reinstatement of the creditor's petition in this case.

In that case, the creditor's petition was dismissed because on the date I of hearing the judgment creditor was absent. The judgment debtor was present, the petition having been served. The judgment creditor

A subsequently applied for reinstatement of the petition. The judgment debtor objected to reinstatement, relying on r 120. The objection was upheld by the learned judge on appeal.

Relying on that case, learned counsel for the judgment debtor here submitted that the senior assistant registrar had no jurisdiction to allow the B reinstatement of the petition and that the judgment debtor's consent was immaterial because consent could not confer jurisdiction where there was none. I have to say that in that case the learned judge did not use the word 'jurisdiction'. The word was used only by the reporter. See, in the headnote, para 2 under 'Issue(s)' and para 2 under 'Held'.

C In my opinion, r 120 is specifically directed at the circumstance of a creditor presenting a subsequent petition after having neglected to appear on his original petition and after the original petition was either dismissed or struck out — the rule, strangely, does not state the consequence — as a result of the non-appearance. It does not say that presenting another petition is the only course open to the creditor. It ought not to be inferred D that it intends to say so. Its purpose is to bar the presentation of the subsequent petition without the leave of the court. The thinking behind the rule presumably is that, in such a case, the creditor should not be allowed a second chance to proceed against the debtor without the latter being given an opportunity to show that the creditor should not be allowed a second chance.

E The terms of r 120 are such that it is not designed to answer the question, 'Can a creditor apply instead for reinstatement of his petition which has been struck out because of his absence?'. As I said, the rule does not say that the only course open to the creditor is to present another petition. Apart from the reliance on r 120, it has not been argued why the F procedure of reinstatement should not be available for a bankruptcy petition. It is important to bear in mind that if reinstatement was allowed, as it was in this case, that would amount to giving leave, and if the judgment debtor had been given a say on the question of reinstatement, the purpose behind r 120 would have been served. Because r 120 is not designed to answer the question, and the question is not answered elsewhere in the G Rules, there is an absence of a rule on the question of reinstatement of a bankruptcy petition. Because of that — and here I respectfully differ with Faiza Tamby Chik J — r 276 of the Rules applies to render applicable O 32 r 5(4) of the Rules of the High Court 1980, which provides for the restoration to the list of an application by summons that has been dismissed without a hearing for the applicant's failure to attend the hearing. The H application for reinstatement in this case was therefore in order and, the judgment debtor not objecting, the reinstatement is not capable of being questioned.

Alternatively, the question of reinstatement being a question of mere procedure as to which there is a lacuna in the Rules, I think parties are at I liberty to agree to the procedure of reinstatement. The judgment debtor in this case, by not objecting to the application for reinstatement, has agreed to the procedure of reinstatement and to the reinstatement itself. The

reinstatement does not violate the principle behind r 120. Neither has it caused injustice to the judgment debtor. Look at it this way. Although the decision in *Mariam bte Sasiman* was not known to the judgment debtor's solicitors when the reinstatement was consented to, they would have known of the existence of r 120 and of its thinking of the presentation of a subsequent petition. If they thought that there was some advantage to be gained by the judgment debtor if the judgment creditor were to attempt to present another petition instead of applying, as they did, for reinstatement, they, the judgment debtor's solicitors, should have resisted the reinstatement and insisted on the judgment creditor applying for leave to present a fresh petition. But after considering the affidavit in support of the application for reinstatement, and the reasons given therein for the absence of the judgment creditor on the hearing of the petition, they must have decided that, now that the actual circumstances were known, the petition did not deserve to be struck out in the first place; and that must have been why they did not object to the reinstatement and give some reason why, if the judgment creditor had instead sought leave to present a fresh petition, leave would not have been granted. It must be assumed that to the solicitors for the judgment debtor, after taking into account the judgment creditor's explanation and the terms of r 120, reinstatement was fair and just. The judgment debtor cannot now say that the petition ought to have been and to be struck out because, on jurisdictional grounds, it ought not to have been reinstated in the first place.

I dismiss the appeal with costs.

Appeal dismissed.

Reported by Chin En Tek